72-533

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In the Supreme Court of the United States

OCTOBER TERM 1972

No. 72-533

JOHN M. LUTTRELL,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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No._____

JOHN M. LUTTRELL,

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v.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on March 23rd, 1972 and the order denying an en banc rehearing entered on May 23rd, 1972.

OPINIONS BELOW

The Opinions of the United States District Court for Oregon are set forth herein (Appendix pp. 37, 38).

The opinion of the Court of Appeals is unreported and is set forth (Appendix p. 39) and the opinion denying the petition for rehearing is unreported and is set forth (Appendix p. 39).

JURISDICTION

Jurisdiction to review the judgment by Writ of Certiorari is found in 28 U.S.C.A. 1254 (1) and 2901, and Rules of this Court 19 (b). Original jurisdiction was based on the Jones Act (46 U.S.C. 688).

STATUTES INVOLVED

U. S. Constitution, Art. 3, § 2 (Apx. p. 40).

U. S. Constitution, 1st Amendment (Apx. p. 40).

U. S. Constitution, 5th Amendment (Apx. p. 40).

46 U.S.C.A. 688, Jones Act (Apx. p. 42).

45 U.S.C.A. 51, FELA (Apx. p. 42, 43).

46 U.S.C.A. 740, Public Vessels Act 695 of June 1948 (Apx. p. 41).

18 U.S.C.A. 1001 (Apx. p. 45).

18 U.S.C.A. 1018 (Apx. p. 45).

Rules & Regulations for Cargo Vessels, Title 46 C.F.R. Parts 90 et seq. (Apx. pp. 43, 44).

Rule 60b, Federal Rules Civil Procedure (Apx. p. 45).

This petition is being filed within the time limitation dated August 12, 1972 as extended to and including October 2nd, 1972 by the Honorable William O. Douglas.

QUESTIONS PRESENTED FOR REVIEW

1. Is the judiciary constitutionally justified in exculpating a sovereign-fiduciary from its wardship responsibilities by imposing a one year time limitation on a new trial motion (Rule 60b) sought by an aggrieved admiralty ward of this Court where the:

a. fact-finder admittedly relied on the untruthful trial testimony of a Coast Guard official, and the fiduciary denied discovery of requested records to court and counsel in a seaman's case based on negligence and unseaworthiness;

b. when more than one year elapsed after judgment entry and after suicide death of Coast Guard officer witness, plaintiff's counsel discovered that the sovereign-fiduciary knowingly concealed from court and plaintiff's counsel pertinent and material official documentation disclosing massive statutory defaults and testimonial untruths of said witness prejudicial to the seaman's rights and to the advantage of the fiduciary, by being exonerated from liability in a Jones Act case.

Fairly Comprised is the Following Subsidiary Question

A. Can judgment favorable to the fiduciary sovereign be constitutionally sustained (Rule 52a) where

the fact-trier's decisional processes were grounded on the harsh common law principles supported by the sovereign's knowing and intentional false testimony, concealment and refusal to produce requested documentary truths, all being contrary to the requirements of federal statutes and extremely prejudicial to plaintiff's cause?

2. Is it constitutionally sustainable for the federal judiciary to impose a severe and substantial monetary penalty on counsel for an aggrieved admiralty ward requested by special counsel for the sovereign in a Jones Act case where plaintiff's counsel discovers and attempts to bring to the court's attention the knowing and intentional chicanery, marketing of untruths and massive statutory defaults practiced by the sovereign which were previously undisclosed to the fact-trier all of which resulted in prejudicing the constitutional rights of the admiralty ward of this Court?

STATEMENT OF THE CASE

The judgment (Apx. p. 39) sought to be reviewed is the Ninth Circuit affirming the denial of new trial motions (Rule 60b) of the District Court of Oregon (Apx. p. 37, 38) sought by an aggrieved admiralty ward based on discovery of new facts inimical to the interests of the sovereign-fiduciary revealing testimonial untruths and statutory defaults on which the court relied in exonerating the fiduciary shipowner from negligence and unseaworthiness in a Jones Act suit brought by a seaman sustaining permanent in-

juries on duty and aboard defendant's vessel Alfred Victory on September 14th, 1966, tried to the court on May 13th, 1968 and adverse judgment entered May 28, 1968.

Thereafter and during unsuccessful appellate processes based on Rule 52a F.R.C.P., plaintiff's counsel on February 23rd, 1970 learned of the suicide death of Commander Bertram Ronneberg, U.S.C.G. occurring about November 23rd, 1969 while on duty at Seattle. Ronneberg was a primary government witness, on which the fact-trier admittedly relied in his decisional processes.

On April 1st, 1970, the Portland Coast Guard office released to plaintiff's counsel pertinent extracts of Ronneberg's official coast guard inspection book, previously never available to counsel. Such book was a part of the vessel's official record and contained references to plaintiff's injuries. Ronneberg testified from personal knowledge of said book. Examination thereof revealed massive statutory defaults and his untruthful testimony in court on which the fact-trier relied, despite strong evidence revealing defaults given by ships officers as adverse witnesses and authorized to speak on behalf of the shipowner. Contentions of plaintiff were in fact supported by his superiors within the ship's discipline.

Based on the fact-triers whole hearted indorsement of Ronneberg's in trial testimony "he had no axe to grind" and the assurances by special counsel to court and plaintiff's counsel that requested statutory rec-

ords were not available which would have revealed witness identity, presence of personnel at assigned stations and duties surrounding the events in which Luttrell was injured, confirmed the fact that discovery was denied when and revealed in the inspection book, supported the untruthful in trial testimony of Ronneberg.

Plaintiff's new trial motion (R. p. 98, 138) factually supported a fraud on the court situation (Rule 60 b) (Apx. p. 45) justifying his relief from an adverse judgment. The sovereign resisted the motion and the reconsideration thereof in short summary hearings before the *Honorable Alfred T. Goodwin* without any hearing of any kind other than said summary hearings. The court also assessed a financial penalty of $400.00 against plaintiff's counsel requested by special counsel (Apx. p. 38).

Judge Alfred T. Goodwin was neither the fact-trier nor was he possessed of the record. It would have been procedurally correct for these motions to have been heard by the *Honorable William N. Goodwin*, the fact-trier, possessed of the record, who heard the witnesses. He should have had the opportunity of correcting his own record.

Appellant's timely appeal was thwarted after the filing of briefs, by respondents filing a motion to dismiss based on the appeal being vexatious, frivolous and untimeliness. Appellant's resistance was an exercise in futility. Thus far the sovereign has not been required to respond to any of the new allegations raised in the motion by appellant (Apx. p. 39).

Appellant's motion for an oral argument, en banc hearing was similarly denied (Apx. p. 39).

The facts surounding petitioner's injury reveal that Commander Ronneberg was a 17-year veteran Coast Guard officer primarily in the marine inspection division, he was the responsible Coast Guard officer in matters concerning the Alfred Victory. He was custodian of the official records. He was obliged to enforce maritime safety regulations (Apx. p. 43, 44) (Title 46 C.F.R., Parts 90-98) and certify the vessel's compliance among other statutory obligations.

He was the sovereign's designated official to certify and accept the rehabilitation of the Alfred Victory for duty in the Vietnam sea life from a local shipyard.

Ship's company consisted of 48 men, newly employed and at the time of the injury generally unidentified to each other.

Petitioner was an untrained and untutored person who obtained this job as ordinary seaman about a day or so before the injury. His seagoing experience consisted of only 10 days about 20 years previous to the injury.

On September 14th, 1966 Commander Ronneberg was supervising a presailing statutory boat drill for the vessel's certification required when the crew was new. This required the full participation of all crew (Apx. pp. 43, 44). Concurrently the vessel was preparing for imminent departure for sea, the harbor tug

alongside and pilot on the bridge. These various seagoing duties dissipated supervision.

Petition responded to his boat drill duties by leaping from the top of a 48-inch high pipe rail on the cabin deck into his No. 3 lifeboat starboard about 40 inches outboard. An AB seaman in the lifeboat instructed petitioner to assist in the provisioning of the boat, a task required to have been accomplished prior to the drill. He exited the boat in the same manner as entering, he missed the rail due to movement and fell about 18 feet or so to the deck below sustaining permanent injuries.

Coast Guard official injury reports and vessel's injury reports reveal Luttrell was injured while attending to certain boat drill duties. While the duties he was performing were during the drill, he was not performing the duties prescribed in the boat drill because of his being told to assist in the provisioning of the boat, also an essential task (Apx. p. 43).

He denied performing the precise duties described in the reports. Ronneberg was the custodian thereof. This was his nemesis because for him to comply with the injury reports would have been an untruth. This then revealed the statutory defaults. Ronneberg accepted and approved the injury reports. He was there at the time.

Ronneberg's inspection book, an official record previously denied to plaintiff and the court, recorded petitioner as being injured and performing duties during the drill. It also revealed massive statutory

defaults and disclosed that Ronneberg testified untruthfully at the trial generally as follows, all of which is documented in plaintiff's motion by reference to the transcript of testimony. The sovereign also emphasized the ship-shape testimony relied on by the fact-trier during the unsuccessful appeal in *Luttrell* v. *U. S.* (1970), 423 F.2d 1197:

1. *That the lifeboat weighed about 9000 pounds.* (Plaintiff's counsel identified the boat from the book and the manufacturer revealed the boat weighed 3250 pounds.) The crucial issue being whether the boat could be moved and thus be unsafe. Testimony revealed it could be moved. But the fact-trier's opinion revealed, based on Ronneberg's testimony on which he relied and stated, "that you can't move 9000 pounds of steel."

2. *That Luttrell was injured after the drill was over,* which provided the fact-trier with the basis that Luttrell was a volunteer. The inspection book reveals that Ronneberg specifically noted in his official record that Luttrell was injured during the drill. The fact-trier relied on Ronneberg's false testimony that the drill was over and then made the common law pronouncement that petitioner was a volunteer in his duties.

3. *That the vessel was accepted prior to the injury.* Counsel found from the inspection book that the acceptance papers may have been dated prior to the injury but the book reveals that the acceptance was not valid until delivery of the papers to the Master by the Coast Guard Accepting Officer until after the injury. The issue being whether the vessel was seaworthy at the time of

the injury. Ronneberg testified the vessel was accepted prior to the injury and thus seaworthy. The fact-trier relied on that testimony.

4. *That the Drill was satisfactory.* The truth gleamed from the inspection book reveals that 15 crew members of the 48-man crew were water borne port side in two of the vessel's 4 lifeboats, leaving undisclosed the presence of the balance of the crew. Each lifeboat would require the presence of 12 men, based on a 48-man crew, for the execution of congressional mandates and Coast Guard regulations in a pre-sailing boat drill. This reveals a statutory default which would have supported lack of full crew participation in the statutory drill, and supports dissipation of crew and supervision because it becomes impossible to have a full participation when the vessel is preparing for sea. Lack of full crew participation and supervision contributed to plaintiff's injuries.

5. *That the boat was provisioned prior to the drill.* Plaintiff testified that he was provisioning the boat during the drill contrary to statute and regulatory provisions. The issue being whether the boat was provisioned and ready for sea prior to the drill. Ample testimony supported this default (Apx. p. 43).

6. *That access to the lifeboat was safe.* Ronneberg testified that the access was safe. Testimony by ships' officers revealed the only access as follows: (1) seaman could jump from the cabin deck rail outboard 40 inches to the 2 inch gunwale of the lifeboat (2) climb or slide down greasy cables (3) or step on a greasy cable and pull up into the boat. There was no safe method

and this is supported by the physical facts (Apx. p. 43).

Testimony revealed that private shipowners had eliminated the hazardous and unsafe method of seamen entering and departing the lifeboat by erecting a railed walk-way from the cabin deck into the boat.

Prior to the trial counsel for plaintiff requested production of statutory records (1) Portland crew list (2) Station bill (Apx. p. 44) showing duties of all crew during emergencies—lifeboat and fire drills are emergencies, and (3) No. 3 lifeboat crew list (Apx. p. 44), a document required to list assigned crew and their duties therein. These documents were denied by special counsel asserting that such were unavailable to court and plaintiff's counsel. This then denied witness identity to plaintiff and assigned duties of crew at the time of the injury.

Ronneberg's official inspection book only became available after his suicide death, long after trial and more than one year had elapsed after adverse judgment entry. Counsel had in fact suspected that less than the truth was revealed by the sovereign.. His continued explorations into the truth were fruitful, but not within the time limitation imposed by the Ninth Circuit.

The matters were brought to the court's attention outside the record during the appellate processes by notice only as required by professional ethics that the full facts were knowingly concealed by the sovereign

adversary.[1]

The adversary failed to take cognizance of the discovery of their concealment, which required plaintiff to bring these matters appropriately to the court's attention (fact-trier) by the new trial motion revealing frauds practiced on the court and during the appellate processes (R. 98, 137). For counsels' efforts to comply with professional ethics, his oath, standards of this Court and obligations to an admiralty ward of this Court he was penalized financially at the request of special counsel who had knowledge thereof or at least had knowledge that there were records outstanding. This would have revealed the truth. Special counsel also represents powerful private shipping interests.

The motion referenced untruths as recorded in the trial record of *Luttrell, supra,* that the court and counsel were denied knowledge thereof and that Ronneberg testified wrongfully and falsely and such was known to sovereign's counsel. This prejudiced the seaman to the advantage of the sovereign. Had the sovereign revealed the inspection book, the sovereign's witnesses would have been required to speak the truth which in turn would hav supported and sustained plaintiff's contentions.

Counsel states in his affidavit therein that there was no basis for deposing Ronneberg, a representative

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[1] Certiorari was denied in this Court October term 1970, Case No. 587. This Court is requested to take judicial notice thereof of matters patent on the face of the record. Matters outside the record which may be inferred from facts are not subject to such notice. *Bienville Water Supply Co.* v. *Mobile,* 186 U.S. 212.

of the executive endowed with the oath of fidelity to and being privileged by his commission to represent the executive. Counsel for plaintiff feels and asserts that he is complying with his obligations to this Court by commendably restraining himself in asserting the chicanery, untruths and lack of process by bringing these matters to the attention of the court.

The gross material and prejudicial misstatements of fact made by Ronneberg in his official capacity was the admitted basis on which the fact-trier based his judgment exonerating the sovereign shipowner.

This new evidence requires the attention of the fact-trier, it was denied to the court based on representations that the records were not in existence.

There is neither support of the sovereign's position in the Constitution or in case law pronouncements of this Court which justify the sovereign withholding from the court or plaintiff's counsel records vital to the truth, either detrimental or favorable, surrounding events wherein a ward of this Court seeks relief.

The sovereign shows an unjustified complacency with the facts as well as an astonishing insensitivity to constitutional responsibilities under the Due Process Clause of the 5th Amendment pertaining to disclosures of evidence, to 1st Amendment rights regarding right to petition the sovereign for grievances, and right to express himself, rules of court requiring disclosures and bar association professional ethics rules

requiring government counsel to reveal all facts so that rudimentary demands of justice can be achieved.

This case cries out for review.

REASONS FOR GRANTING THE WRIT

1. The Decision below imposing a time limitation on an admiralty ward disclosing a fraud practiced on the court by way of the sovereign-fiduciary concealing material evidence and presenting testimonial untruths to its benefit and the seaman's detriment is in conflict with decisions of this Court requiring full truth and disclosures and that rights of admiralty wards be not imposed upon, thus precluding the exoneration of the fiduciary by a time limitation.

This is a jurisdictional question of monumental concern to the wardship responsibilities of this Court.

In the context of Rule 60b, it becomes obvious that the lower court considered the discovery of the new evidence as being within a time limitation of one year. But when the discovery thereof took place, the time limitation had long passed. This record was simply never available, why it was unavailable is not specifically known, however examination thereof reveals many reasons. It simply supported defaults and then when viewed in the light of Ronneberg's in trial testimony, it revealed misleading and untruthful testimonial assertions. The discovery thereof then manifested a fraud on the court situation which brings into focus "or to set aside a judgment for fraud on the court." This Court has never set a time limitation on this focus and other courts of appeal have similarly not set a time limitation for relief.

The Ninth Circuit did not find appellant's motion frivolous or vexatious, it simply imposed a time limitation (laches). The proof was concealed in the enemy camp until discovery by counsel long after the fact. Counsel alluded to the questionable probative value of the evidence presentd to the court in the unsuccessful appellate processes. Therein the respondents represented to the appellate court that the drill was over, that the lifeboat weighed over 9000 pounds, that the vessel was seaworthy. These and other representations made to the fact-trier were destructive of petitioner's rights. The sovereign denied concealment of the records.

It is one thing to question the probative value of the evidence and it is quite another thing to discover evidence that impeaches the judgment or shatters the verity thereof. This cannot be characterized as harmless error.

The concealment of the inspection book coupled with the questionable unavailability of the statutory records denied the rudimentary demands of justice to the seaman and violated the judicial environment with a maximum pollution index.

Seamen are wards of the court and nation and federal courts remain as guardians of seamen, the agency chosen by Congress to enforce their rights, this by assignment of the Constitution and supplemented by the statutes in order to assure protection of their rights in this unique calling; compare *Robertson* v. *Baldwin*, 165 U.S. 275, 287; *Garrett* v. *Moore-McCor-*

mick Co., 317 U.S. 239. The sovereign created the present status by failing to reveal and then preesnting misleading testimony on which the fact-trier relied. Such does not constitute a judicial determination providing for res judicata. Any doubt on that score should be decided in favor of the seaman as ward of this Court; compare *Tsakonites* v. *Transpacific Carriers Corp.*, 322 F. Supp. 722 (1970). Under these circumstances the denial herein can lead to all manner of future abuses, it could bring back the old common law rules now long discarded by this Court; it could license litigants to conceal evidence and present misleading testimony and could circumvent the requirements of remedial legislation entrusted in this instance to this Court to see that its seamen wards are not imposed upon.

In Seamen and FELA cases, the shipowner possesses records and controls the proof power essential to the rights of the injured seaman, even though full discovery is presumably available, instantly it was not and the seaman's power of proof was destroyed; compare *Gardner* v. *National Bulk Carriers*, 310 F.2d 284 (5 Cir. 1962). The enforcement of the procedural rule presently under review would simply make this Court the instrument by which an injustice is continued; compare *People Nat'l Bank* v. *Mary E.*, 191 U.S. 272.

The withholding of information is a pervasive tendency of public officials, the reason may be evil or good, but no court should allow a public official to decide what facts the litigants, in a matter of concern to the court, have a right to know. Compare, *Aaron*

Burr Cases, Robertsons Rep. 11, 517 (1808) and Access to Official Information, a Neglected Constitutional Right, 27 Ind. L. J. 209 et seq [1951]. Luttrell was a victim of concealment wherein the shipowner simply conformed the reports to the drill requirements. This effectively countered the negligence and contentions, although in this respect he was aided by the testimony of the ship's officers. On the other hand, the sovereign by concealing its own records, it was then able to represent to the court through the purportedly impartial and authoritative testimony of Ronneberg that all was shipshape. This then became the basis of the adverse opinion resulting in the injustice complained of and supports the reason necessary for the new trial or a vacation of the judgment by a fact-trier.

Injustice may be done in admiralty cases, if the government withholds information; "but right cannot be done if the government is allowed to suppress facts in its possession"; compare *Bank Line* v. *U. S.*, 76 F. Supp. 801, 804, 168 F.2d 133, 138 (2 Cir. 1947); *Loubriel* v. *U. S.*, 9 F.2d 807, 808 (2 Cir.).

The fiduciary status creates additional demands of disclosures thus bringing into focus that Rule 60b is a remedial rule on the part o f the court to correct injustice. Compare *Grosjean* v. *American Press*, 297 U.S. 233, 249-50.

The Court construed and applied this rule in *Klapprott* v. *U. S.*, 335 U.S. 601 (1949), modified in 336 U.S. 942 in a judgment denaturalizing Klapprott. The

government contending that his motion four years after judgment showed nothing more than excusable neglect which came under the one year limitation. In disposing of that motion the court "furthermore Rule 60b strongly indicates on its face that courts are no longer to be hemmed in by the uncertain boundaries of these and other common law remedial tools."

There is no language in the rule limiting the authority of the court in vacating judgments or to grant a new trial and being remedial justifies this Court under the circumstances to do so in the interests of justice. Justice cannot be accomplished where there is an active and knowing concealment of the truth from the court. The lower courts by invoking a time limitation on discovery of concealment in a fiduciary status affects the due process to which litigants are entitled under our system of government; compare *Scarborough* v. *Atlantic Coast Line R. Co.*, 178 F.2d 253, 15 A.L.R.2d 491 (4 Cir.), and *U. S. Bulk Carriers* v. *Arguelles*, 400 U.S. 351.

The fiduciary status aggravates the fraud on the court involving its own ward. It is elementary that fraud vitiates a judgment; compare *Strong* v. *Repide*, 213 U.S. 419; *Richardson* v. *Green*, 133 U.S. 30; *Nichoalds* v. *McGlothlin*, 330 F.2d 454 (10 Cir.); *Atkins* v. *Dick*, 14 Pet. (U.S.) 114; *Johnson* v. *Waters*, 111 U.S. 640; *U. S.* v. *Throckmorton*, 98 U.S. 61; *U. S.* v. *The Amistad*, 15 Pet. (U.S.) 518; *Schneider* v. *Irvington*, 308 U.S. 147.

Strong argument was made to this Court in *Acker-*

man v. *U. S.*, 340 U.S. 193 (1950) supporting a fiduciary status under Rule 60b in a naturalization suit in which petitioners relied on the advice of an immigration official custodian of their persons. The majority supported the contentions of the government that a fiduciary relationship was not substantiated. Douglas, J., dissented, pointing out that the petitioners were in the custody of the government official and should have been able to repose confidence in his advice, coining an expression "that fiduciary relations given its best meaning encompasses the relationship between the petitioners and the official in whose custody they were." He stressed the humane spirit of Rule 60b as being neutralized by the majority frustrating the purpose of the rule. The draftsmen not intending that the court be limited to specific grounds. The result follows that the majority would have granted relief in *Ackerman* had a fiduciary status been proven, and the dissent focuses on a custodial relationship that makes for a fiduciary relationship. Instantly in *Luttrell*, the fiduciary status exists without any question and this Court has reserved unto itself the protection of seamen.

The granting of the motion is justified when the facts as revealed endow the sovereign with superior knowledge; compare *Smith* v. *Richards*, 13 Pet. (U.S. 26, and Anno., 61 A.L.R. 519; Restatement, Torts § 542b.

Renneberg also had fiduciary requirements, as does special counsel for the government, to reveal and not

conceal. Rights and duties go hand in hand with responsibilities. The federal judiciary should resolve doubts in favor of the admiralty ward.

This Court recognized the inherent power to grant relief when fraud was practiced in it in *Hazel Atlas Co.* v. *Hartford Empire Co.* (1944), 322 U.S. 238. This was a patent case fraud which justified the court vacating a 1932 judgment based on an accomplished plan to deceive the patent office. In *Atlas*, supra, a fiduicary status did not exist and relief was granted. Certainly in *Luttrell* the fiduciary status is an aggravated situation. Fraud raises its evil in a variety of circumstances; compare *Chisholm* v. *House*, 160 F.2d 632, 643 (10 Cir., 1947) and *U. S.* v. *Myers*, 131 F. Supp. 525 (D.C. Cal. 1955); see also Restatement 593, Judgments § 122, comment E at p. 596.

In *Myers*, supra, the court discussed the sanctity of official requirements under the statute (18 U.S.C.A. 1001) as being designed to insure to the whole world, government and employees and general public alike that any record, document instrument or statement made by a government employee, great or small, in his official capacity in the course of his official duties can be relied upon by all.

In *Atchison, Topeka & Santa Fe R. Co.* v. *Barrett*, (9 Cir. 1957), Rule 60b was held remedial and to be broadly and liberally construed, the burden being on the moving party. In *Luttrell*, the burden is satisfied because the fact-trier exonerated the sovereign based on the dominating credibility and endowed responsi-

bility of the responsible Coast Guard official Ronneberg. Petitioner can submit no better evidence than such court admission which now make that judgment untenable. It becomes more so because the Ninth Circuit held as follows in the original case:

> "This case falls in the area where the trial judge, on all of the evidence, could have found in favor of either party. We are certain we cannot find that the court was required to find in favor of plaintiff. Thus we cannot say that the findings, conclusions and decree (judgment order) are clearly erroneous." *Luttrell* v. *U. S.*, 423 F.2d 1197 (1970).

Hence when the above opinion is equated with the fact-trier's reliance on the testimony of Commander Ronneberg and the now revealing documentary truths previously excluded from judicial scrutiny, there is a direct relationship between denial of truth, reliance on untruths and the shattering of the judgment; compare *U. S.* v. *Neff*, 212 F.2d 297. The sovereign has never been required to respond. Certainly they cannot now say there was no concealment of the records which they represented to the Ninth Circuit, wherein appellant's appeal processes were defeated; compare *Harris* v. *New York*, 401 U.S. 222.

Special counsel is the representative of the government and the government acts as a party through the agency of the attorney who directs and manages the government participation in litigation. Herein there is a direct continuity because of the knowledge of special counsel and the records of Commander Ronneberg.

This Court has made it abundantly clear that deliberate deception of a court by presentation of known flase evidence is incompatible with rudimentary demands of justice, notwithstanding there be an obligation to disclose; compare *U. S.* v. *Aaron Burr*, 25 Fed. Cases 191 (1808) and *Giglio* v. *U. S.*, 92 S. Ct. 763 (1972); *Brady* v. *Maryland*, 373 U.S. 87.

The requirements for disclosure in civil and criminal cases appear to be the same, compare *Aaron Burr* cases, supra, and at least in fiduciary situations there should be no less than the same rationale. Where the government is a party to the litigation, the courts have adroitly circumvented obstacles by imposition of indirect inducements to disclose information, compare *Gardner* v. *National Bulk Carriers*, 310 F.2d 285 (5 Cir. 1962).

Certainly in a matter so vital to the protection of this seaman from what appears to be a serious breach of fiduciary relationship, it would take little of the court's time to examine the full record as revealed in the motion, examine the testimony of Luttrell, testimony of Ronneberg; and at the same time require the sovereign to respond as to why this record was not revealed and explain the questionable verity of Ronneberg's testimony, compare *Ex parte Virginia*, 100 U.S. 339, 348.

This Court has made it clear that when the state, although not soliciting false evidence, allows it to go uncorrected when it appears this is also a denial of the rudimentary demands of justice, and a "new trial

is required if the false testimony could in any reasonable likelihood have affected the judgment of the jury," compare *Giglio*, supra. A new trial or a reversal of the original judgment is not only justified but required in the interests of constitutional justice. The facts have not disappeared, all the records, exhibits, testimony and all thereto pertaining are available for examination. Herein, the government's exoneration was based almost entirely on the absence of their statutory records and the "shipshape testimony" of Ronneberg.

The sovereign should not be permitted to erect procedural barriers, because when a person has practiced deception with a view to a particular end, he cannot be allowed to deny its materiality; compare *Smith* v. *Kay*, 7 H.L. Cas. 750, 11 Eng. Reprint 299 H.L. The mind boggles at the imposition of the time limitation relieving the keepers of the silence from exposure; compare *Vaughn* v. *Atkinson*, 369 U.S. 527.

The court in *O'Ueil* v. *U. S.*, 79 F. Supp. 827 solved a government non-disclosure situation in an admiralty case by simply refusing to permit the government to oppose the petitioner's claim, compare *Bank Line* v. *U. S.*, supra. Aid to Luttrell has not surfaced despite the remedial features of Rule 60b as evidenced by the teachings of this Court.

Currently before this Court is a non-disclosure situation in which Douglas, J. granted defendant's motion suspending a criminal trial (*U. S.* v. *Ellsberg and Russo*, Pentagon Papers Case), this Court concurring

in which the government assertedly failed to disclose certain information. In *Ellsberg*, supra the failure to disclose might well affect the liberty of defendants. In *Luttrell*, the failure to disclose affected his right to have due process of law before the court, his rights were affected, and the sovereign benefited.

Certainly litigants and all the people in these United States have a right to know of public transactions and how far they are conducted with fidelity and ability; compare *Aaron Burr's* cases, supra. Certainly, the freedom of information and the freedom to obtain information and the disclosure of information protects society from those in power. Absent such disclosure and freedoms the 1st Amendment is infringed, and which instantly affects petitioner's rights under the 5th Amendment pertaining to equality and due process; compare *Cummings* v. *Missouri*, 4 Wall 277, 325; *Thomas* v. *Collins*, 323 U.S. 516, 530.

Courts can no longer tacitly assume that access to information is uniformly permitted in view of this and other cases revealing arbitrary concealment. Instead the courts must expressly accord constitutional recognition to acquisition as they have to dissemination of information.

Fraud on the court arises variously, motive is of no consequence; compare, a bankrupt perpetrated fraud on the court by violating a statutory duty, see *In re Schnable*, 61 F. Supp. 386; see also *Aronfsk* v. *Bostian*, 133 F.2d 290 (8 Cir.), a naturalization was vacated in *U. S.* v. *De Francis*, 50 F.2d 497.

Citizens of a free democracy must possess the legal right and the legal right must be not denied to examine and investigate the conduct of the sovereign's affairs. The right must be elevated to the position of highest sanctity. Implicit is the right to know what the government is doing. The doings of the sovereign herein hark too much to government by decree. Dictator countries control the judiciary, the press and the very roots of government itself, such a state suppresses facts and admits so.

In our society there can be no influence more disturbing than surveillance by an adversary of its witnesses infiltrating the obligation of the oath.

It follows that courts fail in the exercise of their appellate jurisdiction by not correcting judgments obtained by fraud, or abdicate their responsibilities by not granting a hearing to an aggrieved petitioner. The sovereign appears to be in violation of the charter of its own existence. Due process of law and equal protection are property rights; compare *Matt* v. *U.S.*, 283 U.S. 747; *Mapp* v. *Ohio*, 367 U.S. 643.

Justice Black very significantly pointed out in *Pope and Talbot* v. *Hawn*, 346 U.S. 406, see also comment in Gilmore and Black, Law of Admiralty 384, that seamen are to have the advantage in any court of whatever rules of law substantive or procedural which may be the most favorable to them. Therein the court indicated that it claimed seamen's personal injury litigation as its own.

In view of the remedial pronouncements of this Court that Rule 60b is remedial, and the facts certainly support the grounds of the motion as a fraud on the court situation, such justifies this Court in granting the motion. Certainly Justice Black in *Hawn* has created a double protection to the seaman, this Court concurring regarding the advantages to seamen. Even under the remedial features of the rule, without the advantage of being a seaman, the motion should be allowed. Add to that the consideration of being a seaman, there is no doubt it should be allowed.

A. Where is can be determined that a fact-trier in a Jones Act case based his decisional processes on false testimony, coupled with concealment of material evidence by the fiduciary and utilized common law grounds in exonerating the sovereign fiduciary from liability, the judgment becomes untenable.

The theory behind Rule 52a F.R.C.P. is that the fact-trier had the opportunity to judge the credibility of witnesses; compare *U. S.* v. *Staples*, 256 F.2d 290, 293, 294 (9th Cir. 1958). It follows that Ronneberg's testimony is impeached by his own official report (see 18 U.S.C.A. 1001), and his official writings (18 U.S.C.A. 1018) and communicating falsely with the Congress (33 U.S.C.A. 361).

The physical facts presented in appellant's motion show that the fact-trier's findings were inherently improbable thus losing Rule 52a insulation; compare *Willis* v. *Town*, 182 F.2d 892 (8 Cir. 1950). Absent Ronneberg's testimony, the adverse findings lose foun-

dation; compare *Sanders* v. *Leech*, 158 F.2d 486 (5 Cir.); *Slattery* v. *U. S.*, 231 F.2d 37 (5 Cir.).

The Court by assessing his findings on the verity of Commander Ronneberg's testimony can now be shown to have arrived at his conclusionary findings by a misapplication of the law, the findings then must be set aside; compare *Castrow* v. *Moore-McCormick S.S. Co.*, 325 F.2d 72; *Aguilar* v. *Standard Oil Co. of N. J.*, 318 U.S. 724.

Reliance on Ronneberg's testimony then prompted the fact-trier to characterize Luttrell as a volunteer in the performance of his required duties. This revealed application of the common law principles to seamen's cases which were long ago discarded by this Court in favor of the remedial legislation of the Jones Act; compare *Tiller* v. *Atlantic Coast Line R. Co.*, 318 U.S. 54, 87 (1943), holding assumption of risk as archaic and statutorily abolished in F.E.L.A. actions; *Rogers* v. *Missouri Pacific*, 352 U.S. 500 (1957), sustaining plaintiff's verdict on the slightest negligence in F.E.L.A. actions; *Panama R. Co.* v. *Johnson*, 264 U.S. 375 (1924), upholding constitutionality of the Jones Act which gave seamen injured during course of employment same rights as applied to railroad employees.

Statutory reports available to plaintiff, viz: injury reports over the master's signature, plus the heretofore concealed inspection book, and ships officers' testimony support the fact that Luttrell was injured in the performance of his duties. The defaults

of the vessel became apparent when Luttrell was beginning to assist in the provisioning of the lifeboat—this may well have been a shipyard deficiency—but was the master's responsibility as a presailing requirement. Defaults were freely admitted by the ship's officers and other witnesses.

It follows the fact-trier's decision was not only based on the now shattered credibility of Ronneberg's testimony, he also utilized common law principles which conflict with decisions of this Court; compare *Arizona* v. *Anelich*, 298 U.S. 110 (1936); *Beadle* v. *Spencer*, 298 U.S. 124; *Braen* v. *Pfeifer Oil Co.*, 361 U.S. 206; *Pope and Talbot* v. *Hawn*, 346 U.S. 406. In *Hawn*, Justice Black fashioned a significant maritime rule; "the harsh rule of the common law is completely incompatible with modern admiralty policy and practice;" compare *Calmar S.S. Corp.* v. *Taylor*, 303 U.S. 525 (1938).

It is apparent that the fact-trier relied on the testimony of Commander Ronneberg, and by applying common law principles then was a victim of his own processes. The decision as it stands is at variance with the decisions of the Ninth Circuit, other circuits and the Supreme Court itself. This conflict should be resolved so that rights of seamen shall not be destroyed in from time to time tranquilizing doses.

2. The imposition of a penalty on a member of the bar of this Court petitioning the sovereign on behalf of an aggrieved admiralty ward of this Court is violative of counsel's oath, inconsistent with free government, the spirit of the constitution and ethics of the profession. It imposes a disability on the seaman.

The concealment by the sovereign of its records and the arising of what appeared to be a distinct odor from the adversary's campfires prompted the curiosity of counsel to explore sources for additional viewing which came about following the information received regarding the regrettable suicide death of the Commander. This resulted in the previously unavailable production of his comprehensive official report, in his own hand referencing Luttrell's injury as occurring during the drill and while he was performing drill duties. It also specifically detailed official statutory defauts related to the safety and seaworthiness of the vessel, and his testimonial untruths.

No one has more eagerly resorted to discovery than the sovereign and no one has been more grudging in making it reciprocally available than the sovereign. The sovereign's attempts to thwart plaintiffs in discovery efforts are labeled as unseemly and as an unjust and tyrannical exercise of power; compare *Cresmer* v. *U. S.*, 9 F.R.D. 203 (E.D. N.Y. 1949) and *U. S.* v. *Gen. Motors Corp.*, 2 F.R.D. 528, 530 (N.D. Ill. 1942); see also "Government Immunity from Discovery," 59 Yale Law Journal 1451. The sovereign is committed to a higher degree of fairness than private litigants; compare *Woodruff* v. *Trapnall*, 10 How. 190, 207 (U.S. 1850) and *Giglio*, supra.

Certainly the right to sue the government would be a fiction if counsel were denied the right accorded by the 1st Amendment to petition on behalf of clients. The drafters of the Bill of Rights had the Runneymeade history in mind and well aware of the vital need to keep people informed of non-secret governmental operations. The 1st Amendment provides that protection, and applies to the dissemination as well as the acquisition of information; see 2 Cooley, Constitutional Limitations (8th Ed. 1927) 885.

Secrecy in government is an excellent device to conceal ignorance and error. Arbitrary governmental suppression of facts present a greater justification for judicial intervention; compare *Watkins* v. *U. S.*, 354 U.S. 178.

Counsel is merely armed wtih natural intuitiveness and his oath of office. He possesses not the superior knowledge of the adversary, nor does he have access to the extensive investigative facilities accorded and available by the sovereign to the some time sovereign's special counsel who also doubles as counsel for private powerful maritime interests. Query, can a lawyer serve two masters without diferentiating between sometime private practice and sometime governmental obligations of the same significance. Despite the handicap of denied discovery, plaintiff's counsel did sniff out what appears to be untruths, false testimony and perversions of judicial processes.

The denial of the right to petition under the 1st Amendment then brings into focus the denial of due

process of law under the 5th Amendment; compare *Burton* v. *Weyerhaeuser Timber Co.*, 1 F.R.D. 571, 574 (Or. 1941); *West Va. State Bd. of Educ.* v. *Barnett*, 319 U.S. 624, 639.

The assessing of a severe financial penalty suggests intimidation of counsel so that facts would not be disclosed which prejudiced the rights granted seamen by this nation and the wardship responsibilities of this Court.

Ours is a profession of justice, without fear of intimidation based on concepts of applying rational standards defined by the Constitution and reverence to the iconoclastic precedents of our heritage.

Counsel in his efforts to bring these matters to the attention of the fact-trier for review, and such right is not only accorded by this Court but demanded for the protection of the wards of this Court resulted in hostile adversary and judicial reaction.

Reference to *Ackerman*, supra, and *Hazel Atlas* certainly justify the correctness of counsel's efforts. Notwithstanding those cases and the teaching of this Court therein, the penalty is contrary to the teachings of *Weber* v. *Aetna Casualty Co.*, 97 S. Ct. 1400 (1972) and the expressed rule set by Justice Black in *Pope and Talbot* v. *Hawn*, supra regarding the humanitarian attention to seamen. It becomes and suggests efforts to suggest the imposition of disabilities on an admiralty ward by binding his counsel with tethers not intended by a judiciary in a free country.

This also brings into focus the extent this Court has expressed in applying humanitarian principles in *Panama R. Co.* v. *Johnson*, 264 U.S. 375, 388; *The Arizona* v. *Anelich*, 298 U.S. 110 (1936); *Socony Vacuum Oil Co.* v. *Smith*, 305 U.S. 424 (1939) and numerous others.

At the moment and of concern to this Court, the case has far reaching connotations in subverting the expressed national concerns for the protection of not only seamen, but citizens in every walk of life concerned or litigating with the government. Penalizing counsel in his sincere efforts to bring matters to the attention of a fact-trier of any description then becomes a denial of process which can ultimately result in disaster and loss of freedom to our citizens. Certainly it defys the Runneymeade lessons securing individuals their rights of law of the land that the sovereign be not arbitrary in the exercise of that power which now appears to be assumed; compare *Murray* v. *Hoboken Land & Development Co.*, 18 How. 276 (U.S. 1856) and *Ochoa* v. *Hernandez y Morales*, 230 U.S. 139 (1913).

Instantly there is present the abridgment of the right to petition; compare Black, J., in *Railroad Trainmen* v. *Virginia Bar*, 377 U.S. 1 (1964); *Mine Workers* v. *Illinois Bar*, 389 U.S. 217 (1967).

The sovereign's only interest presently is to intimidate or bring retribution to counsel for exposing for what appears to be a perversion of process by the sovereign concealing its own defaults. Counsel sought

relief in the only forum available to him, the forum that should hear and there appears no real overriding significance why he should not bring this and similar matters to the attention of the court; compare, *Boddie* v. *Connicticut*, 401 U.S. 371, 377.

A case that cannot be tested by principle is not law and untruths should not be canonized in the judicial processes.

This case reeks of consolidation with private interests. The sovereign has within its power to produce witnesses whose testimony and records would have elucidated the circumstances surrounding the injury. They chose not to do so, instead they chose to conceal, and then to tether counsel so he wouldn't reveal. It should be noted that where a person has within his power to produce or reveal witnesses and records explaining the transaction, and such person fails therein, a presumption is created that the explanations would be unfavorable; compare *Graves* v. *U. S.*, 150 U.S. 118 (1893).

Ironically counsel is penalized by the sovereign for revealing what the sovereign denied. Censorship breeds conformity. The lower courts thus sanctioned this invasion.

Were this a case in which this Court required the appointment of counsel to protect, represent or otherwise appear on behalf of persons whose rights were infringed under the organic law, this Court would consider the matter ripe for adjudication.

This case also suggests that counsel compromise his oath to this Court, thus jeopardizing the wardship responsibilities of this Court and nation to its protected persons. This ultimately would reduce advocacy to the most obsequious of flatterers and the most servile tools to those in power at the moment. Puppets in the judicial processes?

This penalty is inconsistent with the existence of in a free government, it is without precedent to justify it and is against the spirit of the constitution and all the foundations on which it was erected.

Since the days of Magna Charta, men have been free to challenge the arbitrary authority of the sovereign, albeit it was necessary to apparently tickle King John'sthroat with a blade at the historic Runneymeade meeting.

Counsel is challenging the penalty as imposing a disability on a seaman ward of this Court who is entitled under the organic laws of this land to be heard, he also challenges the propriety in intimidating or bringing retribution against him. The rights of petition, the rights of redress are at stake and the rights of the courts to be open to listen, to hear and adjudicate impartially all affecting the interests of free men; compare *Marbury* v. *Madison*, 1 Cranch (U.S.) 49, 58.

Lawyers are a part of the judicial system. Matters of importance should be brought to the attention of the courts. This is an important factor in our system of government. Government counsel similarly

have an important role, all towards the achievement of fair and impartial justice, absent any cog in these roles, the administration of justice suffers. If our people are to remain free, there must be the necessary freedom of expression, petition and all those retained rights in support. The Bill of Rights is in support, the Constitution is in support; compare *Schneider* v. *Irvington*, 309 U.S. 147, 161.

It is the untethered expressions of this Court that makes the liberty of its citizens safe.

It conclusively appears from the foregoing that petitioner's motion for a new trial under Rule 60b was warranted. That the courts below erred by erecting barriers to the rudimentary demands of justice inconsistent with the teachings of this Court in admiralty cases. That an additional barrier to the rights of seaman, viz: the tethering of counsel within limits prescribed and set by the adversary fiduciary and to the advantage of the adversary is inconsistent with the rights of people, irrespective of their walks or station in life to be heard and have their rights adjudicated.

Hence the courts below by imposing a time limitation on an apparent fraud on the court situation affects the dignity of this Court. This also becomes a matter of concern to this Court because the courts below have so far departed from the accepted and usual course of judicial proceedings as to call for the intervention of this Court's power of supervision.

CONCLUSION

This Court should exercise its inherent power to vindicate and protect the dignity of its constitutional authority where an apparent fraud has been practiced on it. This is a decision of importance not merely in the interests of the parties but in the interests of justice that decisions of lower federal courts shall not be permitted to stand where there is on the very face of the opinion written support showing that the original judgment was wrong. This is a matter of public importance affecting not only the people engaged in the maritime industry, but people in all walks of life, that their rights be not infringed. And attorneys, that their oaths and obligations be not compromised.

For these reasons and to set right a miscarriage of justice that will adversely affect the rights of all persons, and members of the bar, Writ of Certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,

ADELBERT G. CLOSTERMANN
Attorney for Petitioner

APPENDIX

Motion for new trial denied. United States District Court for Oregon—Alfred T. Goodwin, judge.

This matter came on regularly for hearing before the undersigned judge on June 21, 1971, upon plaintiff's Motion for a New Trial under Rule 60 F.R.C.P. Plaintiff appeared by Adelbert G. Clostermann, his attorney; defendant appeared by Erskine B. Wood of its counsel. The court having considered the motion and the statements of counsel for the respective parties; and having reviewed the record, from which it appears that this case was heretofore tried in this Court and Findings of Fact, Conclusions of Law and Judgment entered on the 27th day of May, 1968, and that plaintiff thereafter filed a motion to set aside the judgment and for a new trial, which motions were heard and denied on the 21st day of June, 1968, and that plaintiff took an appeal to the United States Court of Appeals for the Ninth Circuit, and the Court of Appeals, by per curiam opinion and judgment on February 17, 1970, affirmed the judgment of the district court; and that plaintiff then petitioned the Court of Appeals for rehearing which petition was denied by the Court of Appeals on May 21, 1970; from which record the Court now finds that plaintiff has "had his day in Court" and that there are no grounds for a new trial.

NOW, THEREFORE, IT IS HEREBY ORDERED that plaintiff's Motion for a New Trial be and the same hereby is denied.

DATED this 24th day of June, 1971.

/s/ *Alfred T. Goodwin*
ALFRED T. GOODWIN
United States District Judge

Motion for reconsideration of denial for motion for new trial—United States District Court for Oregon—Alfred T. Goodwin, judge.

IT IS HEREBY ORDERED:

1. Plaintiff's Motion for Reconsideration of Motion for New Trial, Rule 60 F.R.C.P. is hereby denied.

2. Defendant's Motion for Assessment of Costs against Plaintiff's Attorney is allowed, and it is ordered that pursuant to 28 U.S.C. § 1927, costs are allowed in favor of defendant and against Adelbert G. Clostermann, personally, for having so multiplied the proceedings in this case as to increase costs unreasonably and vexatiously, in having filed a Motion for New Trial, Rule 60 F.R.C.P., more than three years after trial of this case and after proceedings in the Court of Appeals, and for having filed Motion for Reconsideration of Motion for New Trial, Rule F.R.C.P., after the Motion for New Trial had heretofore been ruled upon and denied.

The amount of costs to be assessed and adjudged personally against Adelbert G. Clostermann is left open for further hearing and determination.

DATED this 10th day of August, 1971.

/s/ *Alfred T. Goodwin*
United States District Judge

Opinion United States Court of Appeals granting Respondent's motion to dismiss Appellant's appeal.

"Appellant's motion for a new trial was not timely because it was made over one year after judgment of the district court (Fed. R. Civ. Proc. 60). On the record presented to this Court, we have concluded that adherence to the time requirement of Rule 60 does not result in a miscarriage of justice."
March 23, 1972

/s/ *Duniway and Hufstedler*
Circuit Judges

Opinion United States Court of Appeals denying en banc hearing—May 23, 1972.

Before: DUNIWAY and HUFSTEDLER,
Circuit Judges

The panel as constituted in the above case has voted to deny the motion to vacate the order of dismissal and to reject the suggestion for hearing en banc.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on the suggestion for hearing en banc. Fed. R. App. Proc. 35(b).

The motion to vacate the order of dismissal is denied, and the suggestion for a hearing en banc is rejected.

Statutes Applicable

The constitutional provisions involved are:

The United States Constitution, Article 3, Section 2:

"The judicial power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority: To all Cases of Admiralty and maritime Jurisdiction.

AMENDMENT I

CONGRESS shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The statutes involved are:

Public Law 695 of June 19, 1948 (c) 506, 62 Stat. 496; 46 U.S. Code, Section 740, (Public Vessel's Act).

"The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land.

In any such case suit may be brought in rem or in personam according to the principles of law and the rules of practice obtaining in cases where the injury or damage has been done and consummated on navigable water:

Provided, that as to any suit against the United Sattes for damage or injury done or consummated on land by a vessel on navigable waters, the Public Vessel's Act or Suits in Admiralty Act, as appropriate, shall constitute the exclusive remedy for all causes of action arising after June 19, 1948, and for all causes of action where suit has not been hitherto filed under the Federal Tort Claims Act:

Provided further, that no suit shall be filed against the United States until there shall have expired a period of six months after the claim has been presented in writing to the Federal agency owning or operating the vessel causing the injury or damage."

TITLE 46 U.S.C.A. SECTION 688 JONES ACT

Section 688. *Recovery for injury to or death of Seaman.*

"Any Seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located. Mar. 4, 1915, c. 153, Sec. 20, 38 Stat. 1185; June 5, 1920, c. 250, Sec. 33, 41 Stat. 1007.

Section 51: *The Federal Employers' Liability Act, 35 Stat. 65; 45 U.S.C.A.*

"Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations shall be liable in damages to any carrier in such commerce, . . . resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

The Federal Employers' Liability Act, 35 Stat. 66, 45 U.S.C.A. 54.

"That in any action brought against any common carrier under or by virtue of any of the provisions of this chapter to recover damages for injuries, to or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier; and no employee shall be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

RULES AND REGULATIONS FOR CARGO AND MISCELLANEOUS VESSELS

Sub-chapter 1, (Title 46 C.F.R., Parts 90 to 98 Inclusive). C. G. 257. January 3, 1966 (Extracts).

92.25-5:

"Rails and Guards: Rails at least 36 inches high or equivalent protection shall be installed near the periphery of all weather decks accessible to persons on board."

94.15-10 (b) (2):

"Suitable access to the lifeboats shall be provided to enable the crew to prepare the lifeboats for launching."

94.20-5 (b):

"Equipment for LIFE boats: 'Lifeboats . . . shall be fully equipped before the vessel is navigated. . . .'"

97.01, 97.03-1:

"Operations: Provides for statutory penalties for the violation of marine safety statutes."

97.07:

"Provides for reports of casualty, to the Coast Guard, in writing."

97.13-10:

"Duties of crew: The station bill shall set forth the special duties and duty station of each member of the crew for the various emergencies. This includes 'the preparation and launching of lifeboats.'"

97.15-5 (c):

"The person in charge of each lifeboat shall have a list of its crew, and shall see that the persons under his orders are acquainted wtih their several duties."

97.15-35:

"Fire and boat drills. The master shall be responsible for conducting a fire and boat drill at least once in every week. The scheduling of such drills shall be at the discretion of the master except that at least one fire and boat drill shall be held within 24 hours of leaving port if more than 25 percent of the crew have been replaced at that port."

97.15-35 (b):

"The fire and boat drill shall be conducted as if an actual emergency existed. All hands should report to their respective stations and be prepared to perform their respective duties specified in the station bill."

18 U.S.C.A. § 1001

Statements or entries generally.

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years or both.

18 U.S.C.A. § 1018

Official certificates or writings.

Whoever, being a public officer or other person authorized by any law of the United States to make or give a certificate or other writing, knowingly makes and delivers as true such a certificate or writing, containing any statement which he knows to be false, in a case where the punishment thereof is not elsewhere expressly provided by law, shall be fined not more than $500 or imprisoned not more than one year, or both.

Federal Rules of Civil Procedure

Rule 60.

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could

not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgmente upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-533

JOHN M. LUTTRELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner, a seaman, brought this action under 46 U.S.C. 688 to recover damages for the injury he sustained when he fell while getting out of a lifeboat which was secured on the davits of a United States vessel on which he was employed. The district court, finding that the lifeboat had not suddenly moved when petitioner attempted to climb out of it and that there was a reasonably safe means of exit from the lifeboat, held that the vessel was not unseaworthy and

denied petitioner recovery. The court of appeals affirmed (423 F. 2d 1197), and this Court denied certiorari on November 16, 1970 (400 U.S. 915).

On June 1, 1971, petitioner filed a motion for new trial pursuant to Rule 60(b) Fed. R. Civ. P., alleging that he had newly discovered evidence which had been intentionally withheld by counsel representing the government. The district court denied that motion as well as a subsequent motion for reconsideration (Pet. App. 37-38). The court of appeals dismissed the appeal on the ground that the motion for a new trial was untimely made and that "adherence to the time requirement of Rule 60 does not result in a miscarriage of justice" (Pet. App. 39), and denied petitioner's motion to vacate the dismissal.

Petitioner contends that a fraud has been perpetrated on the court because there was a willful concealment of evidence from him. The alleged new evidence, a Coast Guard inspection notebook, is immaterial;[1] the only reason petitioner did not obtain

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[1] The issue at trial was whether there was a reasonably safe method of leaving the lifeboat. Petitioner relies on this document (1) to identify the type of lifeboat involved in the accident; (2) to show that the injury occurred during a lifeboat drill; and (3) to show that part of the crew did not participate in the drill. But there never was any question as to the identity or type of lifeboat involved in the accident; petitioner's case is not helped if it weighed 3250 pounds rather than 9000 pounds. Moreover, a lifeboat drill is performed first on one side of a ship and then on the other side. Petitioner's own testimony was that at the time of the accident the lifeboat drill had already been completed on his side of the

a copy of it at the trial apparently was that he never asked for it. Both courts below have rejected petitioner's contention that he has demonstrated facts which would entitle him to a new trial. There is nothing warranting further review.[2]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

NOVEMBER 1972.

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ship and that he was not participating in the drill when he was injured. Therefore it is irrelevant that the lifeboat drill was in progress on the other side of the ship. Finally, the allegation that part of the crew was not participating in the drill is irrelevant to the issue at trial.

[2] Petitioner's attorney also seeks review of the assessment of costs against him by the district court. This issue was not raised below and accordingly is not properly before this Court. In any event, the district court justifiably concluded that the attorney had conducted so many proceedings in this case as unreasonably to increase costs, and therefore properly required him to pay such excess costs pursuant to 28 U.S.C. 1927.

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In the Supreme Court
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No. 72-533

JOHN M. LUTTRELL,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONER'S REPLY TO MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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PETITIONER'S REPLY TO MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

1. Respondent's November 8th, 1972 Memorandum to Petitioner's October 2d Petition does not appear to comply with Rule 24, Rules of The Supreme Court pertaining to the timely filing of an Answer, and should be stricken. The Sovereign should be held to the same procedural accountability required of petitioner.

2. The Sovereign's Solicitor avoided answering the pertinent constitutional questions arising by the Ninth Circuit imposing a one year time limitation on a new trial motion revealing pertinent, material and substantial evidence knowingly concealed by the Sovereign fiduciary to its benefit and destructive of the seaman petitioner's constitutional and statutory rights focusing a "fraud on the court" situation in an admiralty fiduciary relationship. The Memorandum was not responsive.

3. The Solicitor's statement that petitioner's attorney failed to raise the penalty assessment as an issue in the lower court is also a documented untruth emphasizing the Sovereign's marketing of untruths, now in this court. That issue was raised by counsel as a Constitutional impingement in Appellant's (petitioner herein) Brief No. 71-2640, Ninth Circuit on pages 14, 15, 16, 17 thus:

> "When the State establishes a principle of law and that principle limits the right of sincere dissent or reveals untruths inimical to the welfare of a person, then the protection of fundamental liberties under due process clause and the right of petition is abridged."

The Conclusion portion thereof is:

> "——and setting aside the penalty against counsel."

It is apparent that the Solicitor by lending his prestigious name and title to the Memorandum is joining with special counsel in the courts below by

continuing and advocating the purveying of untruths; so that this court be blindfolded to the facts, and thus continue the frauds upon the courts and plaintiff ranging from the District Court through the Supreme Court. This is a mockery of justice.

The ease by which people can be goaded into silence and submission is understandable in dictatorships where no one pretends the people have rights. But in a representative democracy, where the judiciary is free and lawyers act in compliance to their oath of office and responsibility to the courts, such behavior is incredible.

The Solicitor should be held to the same accountability for the presentation of truths and facts to this Court as counsel herein.

4. The Solicitor's statement that counsel should have specifically requested Commander Ronneberg's Inspection Book in essence and substance admits that such official record of the vessel existed and with the knowledge of special counsel. The only conclusion is that this official record was withheld by knowledgeable persons with designed aforethought because of the adverse and detrimental effect to the Sovereign's position because of the defaults revealed in Ronneberg's legacy of the truth.

This official document was strangely absent from the official coast guard file of which Commander Ronneberg was the custodian prior to trial. This document surfaced only after the suicide death of the Commander. The Solicitor's reasoning is alien to the

concept of maintaining official records and becomes aggravated when fiduciary responsibilities exist. Also revealed therein was the requirement by Ronneberg's superiors that his inspection of the vessel be expedited.

The Sovereign's special counsel ignored the statutory, case law teachings, and ethical requirements of government counsel pertaining to disclosure of the truth. The concealment was obviously prejudicial to the seaman ward. In gauging non-disclosure in terms of due process, the focus must be on the essentials of fairness and not upon the astuteness of either counsel, compare *Brady* v. *Maryland*, 373 U.S. 87 wherein this Court placed the focus on the deprivation of due process squarely upon the harm and not the motive of the government by inquiring (1) did the state have the evidence, and (2) was it substantial and material? Herein there is no doubt the Sovereign possessed the evidence and no doubt that it was substantial and material to the truth in that it revealed defaults of the vessel and in turn supported petitioners allegations of unseaworthiness and negligence.

Brady, supra, makes no distinction whether the evidence was negligently, accidentally or maliciously withheld. The Sovereign should not be permitted to virtuize their deficiencies. Government counsel are required to reveal the truth; and when untruths affecting rights of persons are revealed, government counsel have an obligation to make right that which has wronged a person.

It cannot be said that government counsel have

satisfied these fundamental requirements so that rudimentary constitutional demands of justice be achieved, and constitutional rights of a ward of admiralty be enforced.

That absence or concealment of witnesses or evidence was of concern to the Court, compare Judge Sobeloff in *Gardner* v. *National Bulk Carriers*, 310 F.2d 284 (4 Cir. 1962).

This concealment of evidence and withholding of pertinent and material information from the Court and plaintiff constitutes an offense against the court, party litigants and society.

4. The Solicitor states that methods of ingress and egress to the lifeboat were safe. The vessel's chief officer, in charge of the life boat drill testified as an adverse witness to the petitioner and revealed three methods of ingress and egress, characterizing these methods as unsafe and improper; (1) jumping from a 48 inch high cabin deck pipe rail outboard about 40 or so inches to the 2 inch wide lifeboat gunwale, there being no grab holds or safe footing provided, (2) slide down a greasy davit track or (3) pull one leg over the pipe rail, stand on a greasy cable parallel to the cabin deck and pull up into the life boat. He did not know of a safe way to enter and depart the lifeboat from the cabin deck level where the boat was worked. There was no prescribed book method, you got in and out the best you thought you could.

The failure of the shipowner to provide safe ingress and egress for crew members at the cabin deck

level *was a direct cause of Luttrell sustaining permanent injuries.* This was an obvious violation of the safety regulations and congressional directives that Ronneberg was required to enforce. The absence of the safety requirements were supported by the chief officer. He was authorized to represent the shipowner and make such admissions and speak on behalf of the owner. The physical facts are obvious. Stringent sanctions are imposed for violations; compare *Rogers* v. *Missouri Pac. R.R. Co.*, 352 U.S. 500, 508, 510; *Kernan* v. *American Dredging Co.*, 355 U.S. 431; *Davis* v. *Parker-Goodloe Co.*, 302 F.2d 489; *Cox* v. *Esso Shipping Co.*, 247 F.2d 629. In *Cox*, supra, the failure of the ship owner to comply with its heavy obligation to select and furnish seaworthy appliances could not thus be turned into a fault by a seaman; compare *Salem* v. *U. S.*, 370 U.S. 31.

This Court has consistently refused to apply limiting doctrines in FELA cases (violation of safety acts), compare *Davis* v. *Wolfe*, 263 U.S. 239.

5. The Solicitor states that according to petitioner's own testimony that the boat drill was completed. This is not supported by the testimony, nor the documented records in evidence. This, again, is an untruth presented by the Sovereign. Petitioner was responding to his boat drill duties. The task at hand and required for the imminent sailing of the vessel was the stowing of the lifeboat with provisions. This was a concurrent activity with the boat drill, a default of the vessel and a violation of the safety regulations required to have been enforced by Commander Ronneberg. Peti-

tioner was truthful and this was his nemises because the defaults were revealed. The Chief Officer testified that it was unusual to be stowing the boat during the drill. Shipowner's documentation reveals petitioner was injured while performing duties; compare *Warren* v. *U. S.*, 340 U.S. 523; *Vaughan* v. *Atkinson*, 369 U.S. 527; *Neal* v. *Saga Shipping Co.*, 407 F.2d 481, and *Johnson* v. *Griffiths SS Co.*, 150 F.2d 487 (9 Cir.) in which the Court held "what does it matter which one or how many of the negligent conditions caused the injury or unseaworthy conditions."

Respondent's defaults also included the failure of witness identity, including the identity of an AB seaman, superior to Luttrell, in the lifeboat at the time of the injury. The natural result is the inference that the shipowner has something to conceal, compare *Southern Cross Steamship Co.* v. *Firipes*, 285 F.2d 651 (4 Cir. 1960); *The New York*, 175 U.S. 187, 204.

6. The Solicitor suggests that the weight of the lifeboat was not material. The fact-trier admittedly relied on the authoritative statement of Commander Ronneberg that the boat weighed 9000 pounds and could not be moved. There was ample testimony, including that of the Chief Officer and other witnesses that it could be moved. Certainly when through the inspection book, the lifeboat was identified by reference, and thereafter the documented weight was ascertained from the manufacturer as 3250 pounds, it could have been more easily moved; and much more readily because of the unidentified seaman moving

around in the lifeboat at the time Luttrell was seeking to reverse his entry by jumping to the cabin deck rail from the 2 inch wide lifeboat gunwale.

7. The issue of lack of supervision and dissipation of crew during the drill, concurrently with the stowing of the boat plus crew members also being occupied with getting the vessel underway for sea, was indeed raised at the trial as unseaworthiness and negligence. The concealed official inspection book would have revealed and supported petitioner's contentions and also would have shaken the verity of Ronneberg's in trial testimony. It also would have proven the defaults testified to by the Chief Officer. Ronneberg's testimony was the basis for the fact-trier being led astray to form an improvident decision against the seaman, and in favor of the Sovereign. This adverse opinion now lacks constitutional verity.

The Sovereign omits reference why Commander Ronneberg testified falsely that the vessel was already accepted prior to the injury. On this, the fact-trier relied, which again removes insulation from his opinion adverse to plaintiff. The truth as revealed in the Inspection book was that the acceptance was dated by the Commander on September 13th, a day prior to the injury. The book also reveals that the acceptance was not delivered to the vessel's Master until after the injury sustained by Luttrell. Under the Maritime Laws and regulations of the United States the vessel is not officially accepted or seaworthy until the Coast

Guard accepting officer delivers the acceptance documents into the hands of the Master of the vessel clearing the Master for sailing. In this instance Commander Ronneberg was the official selected by the Sovereign as the accepting and certifying officer.

8. The Solicitor has not answered why the statutory records were not available to petitioner. The records would have revealed the identity and presence of witnesses at their respective locations; and of course their duties at the time. These revelations would have revealed statutory defaults because of the dissipation of the crew at various tasks other than that of the statutory drill. The Chief Officer testified that all crew were supposed to be at their drill stations until after the drill was officially secure. The drill was over, according to the log, at a time after Luttrell's injury. The surfacing of the inspection book after the writers death reveals the "fraud on the court and to this seaman situation." The special counsel for the sovereign had knowledge thereof. This then denied the simple truths to the fact-trier and denied the rudimentary demands of constitutional justice to the seaman ward of this Court.

The concealment of the inspection book also prevented the fact-trier from exercising his lawful responsibilities attendant upon his wardship requirements to this injured seaman. This led the fact-trier to an improperly supported decision because, as the fact-trier stated, Commander Ronneberg had no axe to grind. With the now revelations of the inspection

book, knowingly concealed by the special counsel and others on behalf of the Sovereign for the benefit of the Sovereign and its officials, defaults were indeed apparent to the Sovereign and concealed for the benefit of the Sovereign and to the detriment of the seaman ward of this Court. Obviously the truth was denied to the Court and plaintiff, this makes for "fraud on the court and plaintiff," requiring relief.

CONCLUSION

Based on this Reply and for the reasons in the Peition, it is obvious that the fact-trier and lower courts were led astray from the truths by reasons of the concealments perpetrated by special counsel for the Sovereign and other interested officials. Facts now reveal that the fact-trier's opinion obviously would have favored petitioner. The concealments then created a chain reaction involving the fraud on the court and plaintiff situation directly focusing on the denial of petitioner's constitutional and statutory rights.

This is an alienation of Constitutional responsibilities which, if not corrected by this high tribunal, will be passed to all descendants whose situation is thus one of deprivation.

The Solicitor's memorandum should be stricken as being untimely filed and not responsive to the Petition; and it seeks to purvey and perpetuate untruths in this high court. The Solicitor's Memorandum is unsupportable when viewed with the constitutional rights and statutory obligations enjoyed by the

petitioner and others similarly situated. The concealments by special counsel and other officials are massive, and despite intimidation of counsel herein by special counsel for the Sovereign, were revealed. This is a direct invasion of First and Fifth Amendment obligations and teachings of this tribunal. In these and other matters, the Solicitor has not responded. The Solicitor should not support secrecy in non-secret government obligations; nor should the Sovereign's officials determine that which should be presented to the courts for adjudication in a free democracy. The Sovereign should not be permitted to deny their own facts.

For the foregoing reasons this Court is respectfully requested to grant the Petition to the seaman ward of this Court.

Respectfully submitted,

ADELBERT G. CLOSTERMANN
Attorney for Petitioner